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Private Law: Security Devices

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ence of the red signal lights so strongly encourages reliance on them.

In *Piquet v. Stiaes*,⁷ the court barred a plaintiff for failure to avail himself of the last clear chance in a typical intersectional collision in which the defendant came through the neutral ground section of a divided boulevard and was struck by the plaintiff. The doctrine of last clear chance evolved to relieve a negligent plaintiff of the harshness of the contributory negligence doctrine. The court used it here to bar the plaintiff. It would seem a more simple approach to hold that this plaintiff was guilty of contributory negligence in not keeping a proper look-out and for not having his car under sufficient control to stop in time to avoid the defendant; however, the result reached by the court in finding against the plaintiff on the facts shown seems unquestionably correct.

SECURITY DEVICES

*Joseph Dainow**

SURETYSHIP

In *Fireman's Fund Ins. Co. v. Richard*¹ the debtor failed to meet certain scheduled payments and the creditor did nothing about it until he called upon the surety after the debtor had physically departed from the jurisdiction. The surety's plea of release by reason of a time extension without his consent was dismissed because the facts did not show any agreement for valuable consideration which would have precluded the creditor's right of action for any stipulated length of time. It is sometimes difficult to evaluate the facts but the court had no difficulty in this case in concluding that there had been a gratuitous forbearance or mere indulgence, and therefore the surety was not released. There was no dispute about the law, and both sides agreed that the governing law was stated in the previous case of *O'Banion v. Willis*² (which actually held the other way and with a strong dissent), but it is surprising that there is no mention in the court's opinion of Civil Code Article 3063,³ which is the real basic law for this situation.

7. 198 So.2d 496 (La. App. 4th Cir. 1967).

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1. 209 So.2d 95 (La. App. 1st Cir. 1968).

2. 14 La. App. 638, 129 So. 440 (1st Cir. 1930).

3. "The prolongation of the terms granted to the principal debtor without the consent of the surety, operates a discharge of the latter."

PLEDGE

Forfeiture of a pledged object is strictly prohibited.⁴ Judicial proceedings and public sale constitute the general rule, but there may be a valid agreement for disposition at private sale.⁵ Courts should be, and they are, very watchful to protect the debtor's interests against the impatience or cupidity of the creditor who attempts an oversimplification of his security. In *Elmer v. Elmer*⁶ the court prevented the creditor from appropriating the pledged property through the superficial compliance of a private sale, and provided for future reference some strong guide lines, such as: "the pledgee occupies a fiduciary relation to the pledgor . . . the duty of acting fairly and in good faith,"⁷ as well as "utter disregard by the pledgee of the rights of the pledgor"⁸ and "a dealing with the property incompatible with the pledgee's fiduciary character."⁹ The creditor's purported private sale to himself was annulled and set aside.

PRIVILEGES

Privileges are automatic security devices provided by law to give additional protection to certain creditors who are thereby exempted from the general rule of proration.¹⁰ As such they must be strictly construed.¹¹ One of the creditors long favored by such a preference was the lessor for the payment of his rent.¹² However, the language in these texts is clearly limited to the lessor of immovable property because the terms used are "predial estates . . . houses and other edifices,"¹³ "the house or store,"¹⁴ "the leased premises"¹⁵ and "the rents of immovables."¹⁶ There is no provision of law which creates a privilege in favor of the lessor of movables for the rent due him, and none can be implied on account of the *stricti juris* rule of privileges.¹⁷ Accordingly, in *Econo-Car International v. Zimmerman*¹⁸ writs of sequestration and attachment were dissolved because the lessor (or sub-lessor)

4. See *Alcolea v. Smith*, 150 La. 482, 90 So. 769 (1922).

5. LA. CIV. CODE art. 3165.

6. 203 So.2d 391 (La. App. 4th Cir. 1967).

7. *Id.* at 394.

8. *Id.* at 395.

9. *Id.* at 396.

10. LA. CIV. CODE arts. 3183-3184.

11. *Id.* art. 3185.

12. *Id.* arts. 2705-2709, 3217(3), 3218.

13. *Id.* art. 2705.

14. *Id.* art. 2707.

15. *Id.* art. 2709.

16. *Id.* art. 3217(3).

17. *Id.* art. 3185.

18. 201 So.2d 188 (La. App. 4th Cir. 1967).

of automobiles had no privilege on the automobiles which were sequestered,¹⁹ nor did the facts support an attachment of the bank accounts.²⁰

This decision of the court of appeal (reversing the trial court) is clearly correct and is grounded very firmly and carefully on the appropriate Civil Code articles. The Louisiana lessor's privilege is modeled closely on the French Civil Code, and the French authorities are to the same effect.²¹

The foregoing analysis of the law does not deny or overlook the important and extensive modern development of renting automobiles, large and small construction equipment, and other movables. However, the present Louisiana law does not grant these lessors any extra automatic protection in the form of a preference which would exempt them from the general rule of proration. Whether a privilege should be created in their favor is a complex question of interwoven social and economic conditions as reflected in the development of new business practices, as well as of the effects this would have on other creditors. Meanwhile, it would be a mistake to think of these lessors of movables as being deprived of protection for the payment of their rents because there are always the possibilities of pledges (advance deposits), sureties and bonds, mortgages, and all such conventional security devices as are available to any creditors.

In *Pelican State Associates, Inc. v. Winder*²² the court of appeal reversed the trial court and held that the Civil Code privilege for expenses of last illness²³ does not include charges for hospital board and room, x-ray and laboratory services, drugs, dressings, oxygen, blood-typing, and transfusion charges. The court of appeal also held that this was an action to enforce an open account and therefore was barred by the liberative prescription of three years.²⁴ The Supreme Court has granted a writ of review in this case,²⁵ so further comment will be withheld until final disposition is complete.

BUILDING CONTRACT PRIVILEGES

The large amount of present-day construction is producing not only quite a bit of litigation but there are also new kinds

19. See LA. CODE CIV. P. arts. 3571, 3575.

20. *Id.* art. 3541.

21. *E.g.*, 2 PLANIOL, CIVIL LAW TREATISE nos. 2465-2489 (La. St. L. Inst. transl. 1959).

22. 208 So.2d 355 (La. App. 1st Cir. 1968).

23. LA. CIV. CODE arts. 3191(3), 3199-3204, 3252.

24. *Id.* art. 3538.

25. 252 La. 178, 210 So.2d 56 (1968).

of legal problems as well as new aspects of older ones. In *McGill Corp. v. Dolese Concrete Co.*²⁶ an apartment complex was built on one lot with a 20-foot servitude of passage for a driveway on the adjacent lot. The question was whether the materialmen's privileges covered both lots. It was argued that the situation was governed by R.S. 9:4816 concerning the construction of two or more works on adjacent lots and, since the last work on the driveway had been completed more than sixty days prior to the filing of the liens, that there was no privilege on that lot.

In interpreting the meaning of this statutory provision, the court asserted that it was intended for those instances where a separate building or work was situated on each lot. The court also concluded that the building and the driveway constituted a single project, and since there was no recorded contract the case was governed by R.S. 9:4812 so that the liens were timely filed. However, they could not affect all of the adjacent lot but only the lot on which the building was constructed *plus* the 20-foot servitude of passage over the adjacent lot on which the driveway was constructed.

This interpretation of the scope of the privilege appears to be well founded in the purposes of the statute. If the owner of the building had purchased the 20-foot strip of land it would certainly be covered by the privilege; since he acquired only a servitude, and since a predial servitude is an immovable right susceptible of encumbrance,²⁷ there is no reason why it cannot be encompassed within the privilege. It would be going too far to say that the privilege covers the full ownership of the land because this could result in depriving the owner of his title whereas he had disposed of only a servitude.

In *Davis-Wood Lumber Co. v. DeBrueys*,²⁸ a materialmen's lien which had been timely recorded was erroneously canceled. The court ordered that it be reinstated with full force and effect despite the contention that this would do violence to the public records doctrine. While the public records doctrine is an extremely important part of the law, it is a mistake to consider it so sacrosanct as to exclude exceptions. Even the laborers' and materialmen's privileges under the building contract law are initially "secret liens" within the delays allowed for their filing. The decision in the present case is perfectly in accord with the

26. 201 So.2d 125 (La. App. 1st Cir. 1967).

27. LA. CIV. CODE arts. 471, 3289.

28. 200 So.2d 916 (La. App. 1st Cir. 1967).

long-standing law that the erroneous or fraudulent cancellation of a mortgage does not alter its validity or its ranking.²⁹

The question of imputation of payments can become the vital collateral issue in building contract privileges where the contractor is working on several projects and makes occasional payments to the supplier for materials furnished in connection with the different jobs. If either the contractor or the supplier could make the imputations at will, this could place very unfair burdens on certain owners. Accordingly, where the supplier has received a payment from a contractor with the knowledge that it came from a particular job, the imputation must be made first to the debt incurred in connection with that construction contract; this enables that particular owner to plead payment not only as a defense against personal liability (where contractor does not put up a bond) but also to preclude any lien against his property.³⁰

However, where the contractor of a single project accepted a payment from the owner "in full settlement," this was no obstacle to the unpaid subcontractor filing his claim as a lien against the property.³¹

R.S. 9:4812 requires re-inscription within one year to preserve the lien, but where the property was sold by the sheriff within the year the claim is referred to the proceeds of the sale and the lien has its full effectiveness without re-inscription.³²

A new and interesting problem was present in the case of *Pringle Associated Mortgage Corp. v. Eanes*.³³ A subcontractor, who had paid his laborers, recorded a claim for the sums thus paid, and on the ground of subrogation he asserted a laborer's lien against the property so as to obtain this advantageous priority. The question is discussed extensively in the opinion of the court of appeal where this contention was not allowed. Since a writ of review has been granted,³⁴ further comment is withheld at this time.

29. *Zimmer v. Fryer*, 190 La. 814, 183 So. 166 (1938), and other cases cited. See also *Caumont v. Hickey*, 165 So. 488 (La. App. Cir. 1936), where court recognized fraudulent consultation and protected rights of mortgage creditor but refused to order reinstatement in the records.

30. *Maxwell Hardware & Lumber Co. v. Mercer*, 201 So.2d 660 (La. App. 2d Cir. 1967) (6 cases); *Duffy v. Roman*, 209 So.2d 502 (La. App. 4th Cir. 1968).

31. *Houlemard v. Brierre*, 207 So.2d 185 (La. App. 4th Cir. 1968).

32. *City National Bank v. Sunshine Processing Co.*, 209 So.2d 161 (La. App. 4th Cir. 1968).

33. 208 So.2d 346 (La. App. 1st Cir. 1968).

34. 252 La. 267, 210 So.2d 508 (1968).

CHATTEL MORTGAGE

In *First Nat'l Bank in Mansfield v. Lawrence*,³⁵ where the holder of a second chattel mortgage (on certain drilling rigs) had actual knowledge of the existence of a prior chattel mortgage on the same things, the court decided that the holder of the first chattel mortgage was relieved of a literal compliance with the law concerning registry. A writ of review has been granted in this case³⁶ and further comment is withheld at this time.

PRESCRIPTION

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LIBERATIVE PRESCRIPTION

Juridical Nature of the Loss of the Right of Action

There are two kinds of ways in which a person may lose his right of action as a result of failure to exercise it during a specified period of time.

(1) The first is the ordinary liberative prescription which causes the release of the debt by being a "bar" to the action, and it must be pleaded by the debtor.¹ Thus the defendant's failure to plead this prescription cannot be supplied by the court² and there would have to be a judgment for the plaintiff. Even when the action is barred by prescription, a "natural obligation" still subsists³ so that a voluntary payment made thereafter cannot be reclaimed as "undue."⁴ Furthermore, the ordinary liberative prescription is subject to interferences with the running of time through interruption by lawsuit or acknowledgment,⁵ and by reason of suspension on account of the various legal incapacities of certain individuals, as specified by law.⁶

(2) The second way in which a person loses a right through inaction is more rigid and more severe; it is called "peremption" or "forfeiture." This is not described in the Civil Code, but its two distinctive characteristics are (a) that the right is absolutely extinguished and ceases to exist—not even as a natural obligation, and (b) that there can be no—repeat, no—inter-

35. 207 So.2d 907 (La. App. 2d Cir. 1968).

36. 251 La. 1082, 208 So.2d 537 (1968).

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1. L.A. CIV. CODE arts. 3459, 3463.

2. *Id.* art. 3463.

3. *Id.* art. 1758(3).

4. *Id.* art. 2307.

5. *Id.* arts. 3518, 3520, 3551-3553.

6. *Id.* arts. 3521-3527, 3554-3555, 3541.